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OVERBOOKING OF AIRLINE RESERVATIONS IN VIEW OF "NADER v. ALLEGHENY AIRLINES, INC.": THE OPENING OF PANDORA'S BOX

STANLEY LEE TICE*

I. INTRODUCTION

Air travelers are becoming increasingly aware of airline overbooking of reservations.¹ This comment examines the carrier's practice of overbooking and its attendant problems. The current reservations system gives consumers maximum flexibility in the making, changing, and honoring of airline reservations.² This freedom has created the problem of no-shows, reservation holders who fail either to honor or cancel their reservations. Overbooking attempts to neutralize the no-shows by accepting a surplus of reservations

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¹ The Civil Aeronautics Board defines overbooking as follows: "'Deliberate overbooking' means the practice of knowingly confirming reserved space for a greater number of passengers that can be carried in the specific class of service on the flight and date for which confirmation is given." 14 C.F.R. § 221.4 (1977), 41 Fed. Reg. 40,500. The Civil Aeronautics Board has noted an increase in complaints during 1975 relating to oversales, which constituted 6.7% of the 11,916 complaints received by the Board's complaints division. The comparable percentages for overbooking complaints for previous years are as follows: 7.5% in 1974; 6.6% in 1973; 9.2% in 1972. The Board stated that "consumer dissatisfaction with the existing overbooking practices and regulation thereof is further evidenced by several lawsuits which have recently been instituted against carriers by oversold passengers." *Civil Aeronautics Board Reexamination of the Board's Policies Concerning Deliberate Overbooking and Oversales*, EDR-296 in 41 Fed. Reg. 16,478-79 (1976) [hereinafter referred to as CAB EDR-296].

² See *Civil Aeronautics Board Notice of Proposed Rulemaking*, CAB Docket No. 16563, EDR-109 in 32 Fed. Reg. 459 (1967); *Civil Aeronautics Board Emergency Reservations Practices Investigation*, CAB Docket No. 26253 in 39 Fed. Reg. 823 (1974) [hereinafter referred to as CAB ERPI]; Brief for the Air Transport Association of America as Amicus Curiae, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) [hereinafter referred to as Brief for the ATA].

to replace the vacancies created by the flexible reservation system.³ If more reservation holders show up for their desired flight than are anticipated, the carrier must deny boarding to some of the ticket holders despite their reservations. This is referred to as bumping, and bumping obviously irritates and inconveniences the generally unsuspecting reservation holder.⁴

The consumer's desire to retain a flexible reservation system conflicts directly with the carrier's need to assure sufficient passengers to fill the airplane's seating capacity. The airlines cannot maintain a fluid system without imposing penalties, forfeitures, or subsidies so that the carriers may operate profitably. Carriers have been able to overbook reservations without fear of retaliation from bumped passengers unless the carrier discriminated against that passenger.⁵ The United States Supreme Court's holding in *Nader v. Allegheny Airlines, Inc.* has jeopardized the practice of overbooking because the carriers are not immunized from common-law claims arising from overbooking practices.⁶ The *Nader* case has created difficulties due to the coexistence of the Civil Aeronautics Board (CAB) and judicial remedies available to the bumped reservation holders.

Little authority currently exists for this developing area of law due to the inadequate regulation by the CAB and to public unfamiliarity with the remedies available to the bumped passenger. Section II of this comment describes the concept of overbooking, the methods used to determine the optimum number of reservations to accept, and the need to retain overbooking. Section III reviews the function of the CAB and current CAB regulations applicable to overbooking. Section IV reviews the *Nader* ruling and the problems created by the issues whose disposition was

³ Brief for the ATA, *supra* note 2. For a complete study on the no-show problem and consequential bumping due to overbooking, see CAB ERPI, *supra* note 2; see generally 96 AV. WEEK & SPACE TECH. 30 (Feb. 14, 1972); 77 AV. WEEK & SPACE TECH. 30 (Oct. 1, 1962); 76 AV. WEEK & SPACE TECH. 45 (Jan. 15, 1962); 65 AV. WEEK & SPACE TECH. 38 (July 9, 1956).

⁴ Comment, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200, 1202, 1205 (1976). However, "the reservations system is not one where the airlines indiscriminately sell more seats than are available on all flights and then hope for the best." Brief for the ATA, *supra* note 2, at 10.

⁵ See *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499 (2d Cir. 1956).

⁶ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

omitted in the Supreme Court's decision. Section V analyzes the problems created by *Nader* in light of the scant precedent pertaining to overbooking. Section VI examines the soundness of the CAB's response to the problems caused by the *Nader* case. Finally, Section VII compares previous solutions to the problem with a proposed solution that could circumvent the overbooking dilemma and eliminate these problems.

II. OVERBOOKING PRACTICES: THE NATURE OF THE DILEMMA

A. Concept Of Overbooking

Overbooking dates back to the 1940's when airlines encountered the inevitable occurrence of no-shows, cancelled and changed reservations.⁷ Overbooking was originated to allow the carrier to retain the flexible reservations system by re-selling vacated seats, seats that would have remained vacant unless the carrier accepted an overload of reservations.⁸ Since that time, the number of accepted reservations has been determined by the booking curve.

The booking curve is a statistical correlation between the historical number of reservations and the number of holders who actually show up for a flight.⁹ The booking curve is determined for each flight and yields relatively fixed and accurate predictions for the reservation turnover.¹⁰ If the booking curve indicates that twenty out of one hundred reservations will be changed, cancelled

⁷ Brief for the ATA, *supra* note 2, at 13. The association says most carriers engage in overbooking to combat a chronic industry-wide problem of no-shows. Overbooking is an attempt to increase the passenger load factor, otherwise the air carriers would absorb enormous financial losses due to the empty seats caused by no-shows and cancelled reservations. See *Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers: Notice of Proposed Rule Making*, CAB Docket No. 16563, 32 Fed. Reg. 459, 460 (CAB Order EDR-109 (1967)).

⁸ "Overbooking may be defined as a controlled pre-departure activity that takes place when a carrier intentionally books confirmed reservations in excess of flight capacity." Comments of Delta Air Lines, Inc. on CAB EDR-296 [*supra* note 1], at 2 [hereinafter referred to as Delta's Comments]. The comments are on file with the CAB.

⁹ CAB ERPI, *supra* note 2, at 823-26. In December, 1972, the industry statistics showed the total number of no-shows per flight was 21.2%. In December, 1973, the figure reached 24.7%. Comment, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200, 1201 (1976).

¹⁰ CAB ERPI, *supra* note 2; Brief for the ATA, *supra* note 2; Delta's Comments, *supra* note 8.

or not honored, the carrier will accept one hundred twenty reservations for a plane that holds one hundred passengers. The problem associated with overbooking arises when the prediction is inaccurate. If only eighteen reservations change, then one hundred two passengers will desire boarding; therefore, two reservation holders must be bumped since the capacity of the plane is only one hundred passengers. CAB investigations have found the carrier's reservations systems to be 99.94% accurate.¹¹ The most recent statistics indicate:

Approximately 6,000 passengers were bumped from domestic flights of certificated carriers in selected months in 1974 and 1975, according to CAB. During September and December 1974, and March and June 1975, 5,941 passengers were denied boarding out of 19.9 million enplanements or 3.0 per 10,000 enplanements. Braniff and Allegheny had the lowest rates for trunk and local service carriers with .7 and .3.¹²

A review of the previous years' statistics and industry analysis indicates the following:

PASSENGERS DENIED CONFIRMED SPACE PER 10,000 ENPLANEMENTS¹³

Fiscal year	1975	1974	1973	1972	1971	1970	1969	1968
	6.0	5.8	4.6	5.4	5.3	5.7	9.5	10.0

PASSENGERS DENIED CONFIRMED SPACE PER 10,000 ENPLANEMENTS

Year	Number	Percent Deviation From Mean
Calendar Year 1968	10.0	+ 53.8%
Calendar Year 1969	9.5	+ 46.2
Calendar Year 1970	5.7	- 12.3
Calendar Year 1971	5.3	- 18.5
Calendar Year 1972	5.4	- 16.9
Calendar Year 1973	4.6	- 29.2
Calendar Year 1974	5.8	- 10.8
Fiscal Year 1975	6.0	- 7.7
Mean	6.5	

Overbooking has evolved from the early practice of guessing the

¹¹ CAB ERPI, *supra* note 2, at 829.

¹² Aviation Daily, Sept. 10, 1976, at 53.

¹³ Delta's Comments, *supra* note 8; CAB form 251 in 14 C.F.R. § 250 (1975); CAB EDR-296, *supra* note 1.

booking curve to a highly technical procedure called Capacity Management Programs.¹⁴ These programs utilize highly trained and experienced airline reservations personnel to determine the booking curve.¹⁵

A clear distinction exists between overbooking and overselling of airline flights.¹⁶ Overbooking is a pre-departure reservations procedure designed to fill previously reserved seats as they are vacated due to reservation changes. Overselling is the consequential overload of reservations which can cause more reservation holders than predicted to appear for a scheduled flight.¹⁷ Overselling is, therefore, the selling of more tickets than flight capacity. Overbooking is primarily caused by errors in the prediction of the booking curve. Overselling results from passenger-multiple-booking of reservations and failure of carriers to receive all reservations made by its own employees and travel agents prior to departure time.¹⁸ Passengers make multiple reservations for two reasons: (1) because they remain undecided on a convenient departure time, and (2) the ones aware of overbooking multiple-book to insure against being bumped.¹⁹ Multiple reservations are a major cause of oversales during peak travel times because the passengers making these multiple reservations cause additional no-shows. These additional no-shows distort the booking curve predictions.²⁰

In order to combat multiple reservations and no-shows, carriers take the following steps to improve their Capacity Management Programs in order to reduce the number of bumped passengers:

- 1) Reservations personnel contact reservation holders to confirm

¹⁴ Brief for the ATA, *supra* note 2, at 11.

¹⁵ *Id.* Delta's Comments, *supra* note 8.

¹⁶ Delta's Comments, *supra* note 8, at 2. Overbooking occurs frequently while the occurrence of overselling is less frequent. Refer to the text accompanying notes 12-13 *supra*. Overbooking is a deliberate attempt to combat no-shows while overselling is the unexpected result of an erroneous booking curve prediction and is not deliberately planned. Comments of Allegheny Airlines, Inc. on CAB EDR-296, *supra* note 1 [hereinafter referred to as Allegheny's Comments].

¹⁷ Brief for the ATA, *supra* note 2, at 13; Delta's Comments, *supra* note 8, at 3.

¹⁸ Civil Aeronautics Board Notice of Proposed Rule Making, 32 Fed. Reg. 460 (1967); see Ruppenthal, *Bumping the Passenger*, 190 NATION 551 (1960).

¹⁹ CAB ERPI, *supra* note 2; see Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533 (1974).

²⁰ Brief for the ATA, *supra* note 2; CAB ERPI, *supra* note 2.

space on heavily booked flights in order to assure maximum utilization of seating capacity.²¹

2) Carriers make computerized "dupe checks" to identify and eliminate multiple reservations.²²

3) Carriers cancel reservations of known or identifiable no-shows. Carriers use post-departure reconciliation procedures to cancel reservations of passengers who fail to show for the first leg of a multiple leg flight. Absent such a reconciliation procedure, that reservation would be retained throughout the entire trip causing no-shows for the carrier on the entire journey. The elimination of these reservations allows the reserved but vacant seats to be re-sold to other passengers.²³

4) Finally, carriers monitor the booking curve until departure so that last minute reservations, no-shows, cancellations, and changes may be correlated to prevent oversales.²⁴

B. Benefits of Overbooking

Overbooking has aided the growth and stability of air transportation by preserving reservations flexibility.²⁵ The current reservation system offers maximum flexibility because a traveler may make a reservation in advance of the desired flight and may cancel or fail to honor his reservation without incurring any legal or financial obligation. Overbooking has been determined by the carriers to be the only practical method of combating no-shows while preserving the current flexible reservations system.²⁶ Overbooking preserves these two aspects of the airline industry, yet assures the carrier of economic stability. This reasoning has been persuasive. For instance, *Archibald v. Pan American World Airways, Inc.* contains dicta stating that overbooking is economically mandated in view of reservations cancellations and no-shows.²⁷ The CAB has

²¹ Brief for the ATA, *supra* note 2, at 10.

²² *Id.* at 11.

²³ *Id.* at 10.

²⁴ *Id.* at 10-11.

²⁵ CAB ERPI, *supra* note 2. Comments of National Airlines, Inc. on CAB EDR-296 [*supra* note 1], at 1-2 [hereinafter referred to as National's Comments]; Delta's Comments, *supra* note 8, at 4; Allegheny's Comments, *supra* note 16.

²⁶ Initial decisions CAB Docket No. 26253, Emergency Reservations Practices Investigation at 8-9 in 39 Fed. Reg. 823 (Jan. 3, 1974). Delta's Comments, *supra* note 8; CAB ERPI, *supra* note 2.

²⁷ *Archibald v. Pan Am. World Airways*, 460 F.2d 14 (9th Cir. 1972).

also supported overbooking as a means to combat economic and fuel conservation pressures exerted on the airline industry.²⁸

CAB investigations and the courts have concluded that overbooking benefits the public and does not constitute deceptive trade practices.²⁹ Overbooking is really a substitute for a penalty, forfeiture, or subsidy that would be necessary to compensate carriers for the vacancies created by no-shows. If the carrier could not replace these vacancies with other reservations, the consumer would have to pay higher fares, pay a penalty for not honoring the reservation, or pay for reservations in advance and forfeit part of the purchase price if he failed to honor the reservation.³⁰ It should be noted that CAB investigations have found no substantial abuse of overbooking in recent years.³¹

Carriers contend that overbooking is needed now, more than ever, to combat no-shows. Due to the recent publicity on overbooking, passengers have increased the incidence of multiple reservations which increases the number of no-shows.³²

III. THE CAB AND ITS REGULATIONS CONCERNING OVERBOOKING: THE REGULATORY GAP

A. *The CAB's Purpose and Functions*

Section 1302 of the Federal Aviation Act states the CAB's statutory mandate is both to protect the consumer and promote the carrier's operational efficiency and financial stability.³³ The CAB is

²⁸ CAB ERPI, *supra* note 2; see 86 AV. WEEK & SPACE TECH. 39 (Jan. 23, 1967); see generally 1962 U. ILL. L.F. 259, 264 (1962).

²⁹ CAB ERPI, *supra* note 2; Delta's Comments, *supra* note 8; Nader & The Connecticut Citizens Action Group v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir. 1975); Smith v. Piedmont Aviation, Inc., 412 F. Supp. 641 (N.D. Tex. 1976). Overbooking benefits the public by maintaining reservations freedom by allowing "literally millions of airline seats to be sold and used each year by persons who would otherwise be needlessly denied space." CAB EDR-109, *supra* note 2; Brief for the ATA, *supra* note 2.

³⁰ Brief for the ATA, *supra* note 2; National Airlines has requested that the Civil Aeronautics Board renew penalties for no-shows if overbooking is prohibited or labeled as a deceptive trade practice. National's Comments, *supra* note 25, at 3.

³¹ CAB ERPI, *supra* note 2, at 4.

³² See note 1 *supra*.

³³ The Federal Aviation Act of 1958, 49 U.S.C. § 1302 (1970). The Act provides:

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other

charged with maintaining the most economical system attainable given their duty to protect the consumer. The CAB has therefore allowed carriers to eliminate the risks of underbooked flights and resultant financial loss by permitting overbooking.³⁴

B. Current CAB Regulations Applicable to Overbooking

Section 1324 of the Federal Aviation Act allows the CAB to promulgate rules necessary to carry out statutory duties.³⁵ As CAB regulations do not expressly prohibit overbooking or directly regu-

things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

³⁴ 41 Fed. Reg. 40,500 (Sept. 20, 1976); see generally Russell, *CAB and the Consumer*, 40 J. AIR L. & COM. 51 (1974). See also 14 C.F.R. § 221.177 (1977), 42 Fed. Reg. 12,420 (1977).

³⁵ The Federal Aviation Act of 1958, 49 U.S.C. § 1324 (1970). The Act provides:

(a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

(b) The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this chapter within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and enforcement of this chapter.

Pursuant to § 1324, the CAB has promulgated "Boarding Priority Rules" in 14 C.F.R. § 250 (1976).

late the practice of overbooking, a regulatory gap has developed.³⁶ The boarding priority rules appear to condone the practice, since the regulations contained therein address the remedies available to bumped passengers. The intent of the boarding priority rules is to prevent unlawful discrimination in determining priorities among bumped passengers by providing a method for determining which passengers will board first.³⁷ The compensation to be given to passengers denied boarding is also set forth in the boarding priority rules.³⁸ The CAB has also encouraged the carriers to improve their Capacity Management Programs, thereby reducing the number of oversales.³⁹

CAB regulations specifically require carriers to establish and maintain boarding priority rules.⁴⁰ Boarding priority rules determine which reservation holders will be allowed to board the aircraft when oversales occur.⁴¹ Once a passenger has been bumped, the carrier must offer an acceptable alternative flight or tender to the passenger liquidated damages as a result of being bumped; this is referred to as denied boarding compensation.⁴² The boarding prior-

³⁶ 41 Fed. Reg. 40,500 (Sept. 20, 1976). Subsequent to the writing of this comment, the CAB has promulgated a rule, effective April 3, 1977, which requires carriers to notify the public that air carriers overbook reservations. Carriers must post and distribute the following notice:

Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation. A person denied boarding on a flight may be entitled to a compensatory payment. The rules for denied boarding are available at all airport ticket counters. *Re-examination of Board Policies Concerning Deliberate Overbooking and Oversales*, 14 C.F.R. § 221.177 (1977), 42 Fed. Reg. 12,420 (1977).

³⁷ 14 C.F.R. § 250 (1976).

³⁸ 14 C.F.R. § 250.9 (1976).

³⁹ Civil Aeronautics Board Notice of Proposed Rule Making, EDR-248 (June 4, 1973); *Mortimer v. Delta Airlines, Inc.*, 302 F. Supp. 276 (N.D. Ill. 1969).

⁴⁰ The CAB regulations that apply to overbooking are set forth in 14 C.F.R. § 250 (1976). The priority rules apply to carriers regulated by the CAB; *id.* § 250.2. The carriers are required to file their denied boarding compensation amounts with the CAB and incorporate that into their tariffs. The rules require carriers to establish priority rules for determining which passenger shall be bumped and prohibit the carrier from giving undue preferences or advantages to any particular person. *Id.* § 250.3.

⁴¹ 14 C.F.R. § 250.3 (1977). The boarding priority rules require the carrier to tender the denied boarding compensation to the passenger as the CAB remedy for overbooking. This tender if accepted relieves the carrier of all liability for all claims that might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the desired flight.

⁴² *Id.* § 250.9. The procedure the carrier must follow when a reservation

ity rules set forth the regulations detailing procedures for determining the amount of denied boarding compensation and the mode of payment.⁴³ The amount of denied boarding compensation is included in the carrier's tariff and the passenger is on constructive notice of his remedy in the event he is bumped.⁴⁴ By accepting the denied boarding compensation or voucher the reservation holder receives a refund of his ticket price.⁴⁵ The deadlines for accepting the CAB remedies are also set forth in the boarding priority rules.⁴⁶ It may be assumed that most passengers fail to read and understand the tariff provisions and are therefore unaware that common-law claims and remedies exist. It is also safe to assume that many passengers are unaware that common-law claims are waived upon accepting denied boarding compensation checks as liquidated damages.⁴⁷

holder is bumped is set forth in the boarding priority rules. This subpart briefly states that the carrier must furnish the passengers who are denied boarding a written statement explaining the terms and conditions of the denied boarding compensation. Copies of the carrier's statements are also filed with the CAB.

⁴³ *Id.* In order to qualify for such compensation the passenger must have complied fully with the carrier's requirements as to ticketing, check-in, and reconfirmation procedures. Note a passenger is not eligible for denied boarding compensation if the flight for which he reserved space is overbooked due to a government requisition for space, safety or weather conditions, or if the carrier is able to arrange comparable air transportation for the bumped passenger. *Id.* at §§ 250.4, .6-.10.

⁴⁴ National Airlines Enforcement Proceeding, 31 C.A.B. 390 (1960).

⁴⁵ 14 C.F.R. § 250.5 (1975). The amount of compensation paid constitutes liquidated damages and when accepted by the passenger becomes the full amount of damages recoverable under CAB regulations. *Id.* § 250.7.

⁴⁶ *Id.* § 250.8.

⁴⁷ *Id.* § 250.6. The rule allows the passenger to waive all other claims as follows:

A passenger shall not be eligible for denied boarding compensation if:

(a) The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of: (1) Government requisition of space; or (2) substitution of equipment of lesser capacity when required by operational and/or safety reasons; or

(b) The carrier arranges for comparable air transportation or for other transportation accepted (i.e., used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of his destination earlier than, or not later than 2 hours after, the time the direct or connecting flight, on which confirmed reserved space is held, is planned to arrive, in the case of interstate and overseas air transportation, or 4 hours after such time

In addition to the boarding priority rules, the CAB requires carriers to submit reports concerning the number and frequency of bumped passengers.⁴⁸ These reports have been used to evaluate the practice of overbooking to ascertain possible abuses of overbooking.⁴⁹

The CAB rules seem adequate in theory. The bumped passenger, however, is rarely satisfied with the regulatory remedy as evidenced by the *Nader* case.⁵⁰ Previous efforts to regulate overbooking have been abandoned in favor of the current regulations which only redress, rather than abate, the cause of the overbooking dilemma.⁵¹ The current regulations are inadequate since overbooking itself is not regulated, and the regulations that do exist are unsatisfactory to the consumer. Carriers themselves fail to adhere to the boarding priority rules since many flights would be delayed if carriers strictly adhered to the rules.⁵²

in the case of foreign air transportation; or

(c) The passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in this ticket at no extra charge: Provided, that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund.

For a discussion of alleged concealment and other possible reasons for the public's unfamiliarity with remedies available to bumped passengers, see generally Comment, *Federal Preemption of State Law: The Example Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200 (1976). Carriers do give bumped passengers constructive notice of the waiver of common claims since many carriers include a waiver notice on the denied boarding compensation check.

⁴⁸ 14 C.F.R. § 250.10 (1975). The provision requires carriers to file reports every 45 days concerning the frequency of unaccommodated passengers. *Id.*

⁴⁹ *Id.* CAB EDR-109, *supra* note 2.

⁵⁰ CAB EDR-296, *supra* note 1, at 16749.

⁵¹ The CAB has abandoned prior attempts to regulate overbooking and eliminate no-shows due to consumer resentment and unenforceability of the programs. The CAB has demonstrated its awareness of the overbooking dilemma prior to the adoption of the boarding priority rules. The CAB issued the following orders regarding the no-show problem: CAB Order No. E-20859 (May 25, 1964); CAB Order No. E-18268 (Apr. 27, 1962); CAB Order No. E-17914 (Jan. 8, 1962); CAB Order No. E-15615 (Aug. 4, 1960); CAB Order No. E-12817 (July 22, 1958); CAB Order No. E-12025 (Dec. 16, 1957); CAB Order No. E-11658 (Aug. 6, 1957); CAB Order No. E-11007 (Feb. 6, 1957); CAB Order No. E-10545 (Aug. 17, 1956); CAB Order No. E-9194 (Apr. 29, 1955).

⁵² *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975). See also *Smith v. Piedmont Aviation, Inc.*, 412 F. Supp. 641 (N.D. Tex. 1976).

IV. PUBLICIZING THE PROBLEM: THE CASE OF *Nader v. Allegheny Airlines, Inc.*

A. *Facts Giving Rise to the Controversy*

Consumer advocate Ralph Nader held a reservation on an Allegheny Airlines flight which was overbooked by the carrier. Nader was offered an alternate flight which would have delayed his arrival by 55 minutes.⁵³ Nader refused the offer and requested that the carrier's agent determine if the plane held any standbys or other passengers who could be bumped. The agent refused, thereby violating the carrier's boarding priority rules. Consequently, Nader took an Eastern Airlines flight to Boston and reached his destination by car.⁵⁴ Due to the change in plans, Nader was unable to address the Connecticut Citizens Action Group (CCAG).⁵⁵ Nader's purpose for obtaining the reservation was to deliver a speech to the CCAG and thereby raise funds for the group.⁵⁶ CCAG lost donations presumably from the failure of Nader to attend the rally after he was bumped.⁵⁷ CCAG filed as a joint plaintiff and contended that it detrimentally relied on the assumption that Allegheny would honor Nader's reservation.⁵⁸ Nader did not accept a denied board compensation check and thereby preserved his common-law cause of action pursuant both to the CAB regulations and the Federal Aviation Act's saving clause.⁵⁹

Nader startled the airline industry since he based his claim for damages on two causes of action independent of CAB remedies. The first cause of action was based on a statutory claim for discrimination and is referred to as the statutory cause of ac-

⁵³ *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 14 C.F.R. § 250 (1975). See note 44 *supra*. Section 1106 of the Federal Aviation Act of 1958, referred to as the savings clause states: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The test for survival of the common-law remedy is whether the common-law remedy is inconsistent with the statutory scheme of regulation. The Federal Aviation Act of 1958, § 1106, 49 U.S.C. § 1506 (1970). See generally *Philco Corp. v. Flying Tiger Line, Inc.*, 171 N.W.2d 16 (1969).

tion.⁶⁰ The discrimination claim was based on the anti-discrimination clause of the Federal Aviation Act.⁶¹ Previous cases had held that a carrier which ignores its boarding priority rules discriminates against the bumped passenger and therefore violates the statutory discrimination provision.⁶² Nader contended that the carrier discriminated against him by not following the priority rules and bumping standbys or lower priority reservation holders.⁶³

The second and more unexpected cause of action was based on a common-law claim of fraudulent misrepresentation and is referred to as the common-law claim.⁶⁴ The basis of this claim was

⁶⁰ 365 F. Supp. at 132.

⁶¹ Nader based the statutory claim on § 404(b) of the Federal Aviation Act of 1958. The provision states:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. § 1374(b) (1970).

⁶² Prior to the *Nader* case, the statutory discrimination provision was invoked successfully in the following cases: *Archibald v. Pan Am. Airways, Inc.*, 460 F.2d 14, 16-17 (9th Cir. 1972); *Kaplan v. Lufthansa German Airlines*, 12 Av. L. REP. (CCH) 17,933 (E.D. Pa., Civil No. 68-2611, decided Apr. 9, 1973); *Mortimer v. Delta Air Lines*, 302 F. Supp. 276, 279 (N.D. Ill. 1969); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 365-66 (S.D. Cal. 1961); *Smith v. Piedmont Aviation, Inc.*, 412 F. Supp. 641 (N.D. Tex. 1976). See generally Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533, 543 (1974).

⁶³ 365 F. Supp. at 132.

⁶⁴ *Id.* Nader based his claim on a common-law fraudulent misrepresentation. Allegheny Airlines contended the CAB had primary jurisdiction to determine if the claim was indeed fraudulent under § 411 of the Federal Aviation Act of 1958. The provision states:

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381 (1970).

If the court had accepted Allegheny's claim, the carrier could have been immunized from common-law claims since a finding by the CAB that overbooking is not fraudulent would have barred the cause of action. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 305.

that Allegheny deliberately misrepresented the status of Nader's reservation. Nader contended the carrier fraudulently sought to conceal its overbooking practices and knew that passengers would rely on the reservation and would be subject to great inconvenience upon being bumped.⁶⁵

B. *Disposition of the Case by the Trial Court*

The trial court held Nader was entitled to both compensatory damages and punitive damages under the anti-discrimination provisions of the Federal Aviation Act of 1958, since he established a *prima facie* case of unreasonable discrimination.⁶⁶ The court stated that Nader established his *prima facie* case because he held a confirmed reservation, the carrier intentionally oversold the plane's capacity, and the carrier failed to honor Nader's reservation priority. The court stated the carrier failed to sustain its burden of proof since the carrier permitted passengers with a lower priority to board the plane instead of a passenger who had a higher priority and who had not been informed of the risks attendant to the carrier's concealed practice of overbooking.⁶⁷

The court also held that the carrier knowingly and intentionally misrepresented a material fact, namely that Nader had a guaranteed reservation for a seat, upon which both plaintiffs relied.⁶⁸ The court held that CCAG was entitled to recover both nominal and punitive damages due to the carrier's misrepresentation, even though CCAG was not a direct party to the transaction.⁶⁹ The court stated that the

⁶⁵ 365 F. Supp. at 132.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* The court stated that the defendant intentionally sought to conceal the overbooking practices from all of its passengers, particularly the victims of the practice.

⁶⁹ *Id.* at 132-33. The court stated:

CCAG is eligible and entitled to recover herein for damages it has incurred due to the Defendant's intentional misrepresentation even though they were not direct parties to the transaction in issue because: (1) the misrepresentation was knowingly and intentionally made; privity of contract is not required here; (2) CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's legal duty to the public at large both under its license and by its better position to prevent injury to the public by full disclosure of its practices affecting the public); (3) CCAG made a reasonable reliance on the misrepresentation and was thereby damaged. See Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 246, 250 (1966).

intentional and substantial overselling of reservations without informing the public of the risks of overbooking justified an award of punitive damages to both plaintiffs. The court upheld the misrepresentation claim since the carrier both sought to conceal such information from the victims of the practice and did so wantonly and maliciously.⁷⁰

The trial court awarded Nader compensatory damages of \$10 and punitive damages of \$25,000; CCAG was awarded consequential damages of \$51 for nominal damages and \$25,000 for punitive damages.⁷¹ Nader was not awarded consequential damages for losses incurred as a result of being bumped.

C. U.S. Court of Appeals Holding

The appellate court reversed and remanded the district court's holding.⁷² The court held that the judgment entered in favor of Nader based on Allegheny's alleged violation of section 404(b) of the Act should be reversed.⁷³ The judgment in favor of CCAG, based on fraudulent misrepresentation, was reversed since the appellate court felt CCAG was in a class of persons without standing to sue the carrier for misrepresentation.⁷⁴ The court also reversed the judgment in favor of Nader based on the fraudulent misrepresentation claim and instructed the district court to further stay the action on that issue until the CAB exercised its primary jurisdiction to determine if the overbooking was in fact a fraudulent misrepresentation.⁷⁵ The court stated that punitive damages may ultimately be awarded for misrepresentation unless the carrier was acting on

⁷⁰ *Id.* at 133.

⁷¹ *Id.* at 134.

⁷² *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975).

⁷³ *Id.* The court felt inconclusive evidence had been submitted to justify the award and felt the judgment was tainted by legal conclusions. Allegheny's boarding priority rules provide that if gate check-in is used, and oversales cannot be ascertained in advance of boarding, then rather than delaying the flight by attempting to select a passenger on board to be bumped who is less inconvenienced, the selection is automatic. The first person to arrive at the gate after the plane is filled will be the first oversale, and so forth. Brief for the ATA, *supra* note 2, at 10-12; Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533 (1974); Comment, *Court Usurpation of CAB Function: The Problem of the "Bumped" Passenger*, 43 U.M.K.C. L. REV. 112 (1974).

⁷⁴ 512 F.2d at 549. The court held the statute was intended to protect only those persons who had attained passenger status and did not contemplate protecting persons relying on a reservation holder's reservation.

⁷⁵ *Id.* at 552.

the good faith belief that overbooking carried the CAB's approval.⁷⁶ The court therefore held that the cause of action based on misrepresentation must be stayed due to primary jurisdiction; consequential damages were too remote to be recovered and the evidence did not support the award of the punitive damages based on the statutory claim of discrimination.⁷⁷ On remand the district court was to re-examine the evidence to determine if punitive damages were warranted under the misrepresentation claim since the appellate court believed the agent's bad faith must first be determined.⁷⁸

D. Disposition by the Supreme Court

The sole issue appealed to the Supreme Court was the applicability of the doctrine of primary jurisdiction to stay the cause of action not dispensed by the CAB.⁷⁹ That is, must the CAB be given an opportunity to determine if Allegheny's failure to disclose its overbooking and bumping practices constitute deception under section 411 of the Federal Aviation Act before Nader's common-law claim based on fraudulent misrepresentation can proceed?⁸⁰

The Supreme Court held that the trial of Nader's common-law claim need not await the CAB's administrative determination as to the issue of deception.⁸¹ The court reasoned that the Federal Aviation Act's savings clause preserved common-law remedies since the field has not yet been preempted by Congress.⁸² Therefore, state common-law claims may be pursued notwithstanding CAB remedies available to bumped passengers.

The Supreme Court distinguished the savings clause in the Federal Aviation Act from a similar clause in the Interstate Commerce Act.⁸³ The court of appeals in *Nader* stated that the savings clause should not be interpreted literally due to the case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.*⁸⁴ In *Texas & Pacific Railway* the Supreme Court refused to permit a common-law action

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

⁸⁰ *Id.* at 298.

⁸¹ *Id.* at 301.

⁸² *Id.* at 298.

⁸³ *Id.* at 298-99.

⁸⁴ 204 U.S. 426 (1907).

challenging a carrier's rate as unreasonable since the survival of such a cause of action would deprive the statute of its efficacy; "in other words, [it would] render its provisions nugatory."⁸⁵ The appellate court in *Nader* therefore held that the savings clause could not be interpreted literally since the pre-existing right was repugnant to the purpose of the statute.⁸⁶ The Supreme Court stated that the distinguishing factor between the *Nader* and *Texas & Pacific Railway* cases was the subject matter upon which the two pre-existing claims dealt. In *Nader*, unlike *Texas & Pacific Railway*, there is no irreconcilable conflict between the statutory scheme and the persistence of the common-law remedies.⁸⁷ The Supreme Court stated that:

The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate—or, indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking . . . [A]ny impact on rates that may result from the imposition of tort liability . . . would be merely incidental.⁸⁸

The Court went one step further and reasoned that the doctrine of primary jurisdiction was not applicable to overbooking since the CAB has not expressly regulated overbooking.⁸⁹ The concurring opinion of Justice White states that the CAB cannot acquire primary jurisdiction over either the common law or statutory cause of action:

It may be that under its rulemaking authority the Board would have power to order airline overbooking and to pre-empt recoveries under state law for undisclosed overbooking But it has not done so Neither an order denying nor one granting relief under that section would foreclose claims based on state law⁹⁰

The Court distinguished between preemption and primary jurisdiction and implied that Congress could preempt state law recoveries. Therefore, in the absence of preemption, the only manner by which

⁸⁵ *Id.* at 437. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

⁸⁶ 426 U.S. at 298.

⁸⁷ *Id.* The I.C.C. provision was not intended to defeat all common-law claims, only those inconsistent with the statute.

⁸⁸ 426 U.S. at 301.

⁸⁹ *Id.*

⁹⁰ *Id.*

state law claims may be stayed is through the doctrine of primary jurisdiction. However, the doctrine does not seem to be applicable to the issues of misrepresentation or discrimination. The Court stated that:

The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.⁹¹

E. *The Issues Unresolved by the Supreme Court's Opinion: The Furies of Pandora's Box*

One effect of the Supreme Court's holding is that the public is now more keenly aware of both CAB and judicial remedies available to bumped passengers. The passenger may elect the CAB remedy of denied boarding compensation, or sue for damages based on either the statutory cause of action for discrimination when the carrier violates its boarding priority rules, or elect the common-law remedy and sue for damages based on a claim of fraudulent misrepresentation. The coexistence of the statutory and judicial remedies upsets the status quo since carriers are now subject to liability beyond the limited award of denied boarding compensation as liquidated damages.

The impact of the *Nader* case is therefore the existence of unresolved issues as to the extent of liability and co-existence of both CAB and judicial remedies.⁹² The decision has created confusion since the carriers must now use overbooking at the risk of being subjected to punitive damages.⁹³ The carriers are therefore subject to tort liability rather than contractual liability.⁹⁴ This confusion

⁹¹ *Id.* at 300.

⁹² See Tariff Rules filed by American Airlines, Inc. in Petition of American Airlines for reconsideration of Order 7608-58, August 23, 1976. 41 Fed. Reg. 40,543 (Sep. 20, 1976). The text of the Federal Register also contains a listing of carriers that have filed for a tariff amendment which would provide constructive notice of overbooking in an attempt to give the public notice of overbooking and thereby preclude the claim based on misrepresentation.

⁹³ See also Comment, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200 (1976).

⁹⁴ 426 U.S. at 300.

may well result in more litigation, since the Supreme Court did not address the issues of punitive or consequential damages.⁹⁵ Due to the Supreme Court's limited holding, the court of appeals decision and previous precedent therefore remain intact.⁹⁶ Following *Nader*, the state of the law may be summarized as follows:

- 1) overbooking is not, per se, deceptive or prohibited;⁹⁷
- 2) a bumped passenger may elect either the CAB remedy or an alternate flight, accept a denied boarding pass check or pursue judicial relief based either on common-law misrepresentation or statutory discrimination;⁹⁸
- 3) the bumped passenger may receive actual and punitive damages under both the common-law and statutory claims;⁹⁹
- 4) consequential damages to the bumped passenger or to persons relying on his reservation are too remote to be recovered;¹⁰⁰
- 5) judicial and administrative relief coexist, since overbooking is not yet within the subject matter applicable to the doctrine of primary jurisdiction.¹⁰¹

V. THE CURRENT RESERVATIONS SYSTEM MUST BE CHANGED DUE TO THE CONSEQUENCES OF THE *Nader* CASE

A. *Can the CAB Obtain Primary Jurisdiction on Overbooking?*

The Supreme Court stated that the doctrine of primary jurisdiction is concerned with promoting the proper relationships between the courts and administrative agencies charged with specific regulatory duties.¹⁰² The high court also stated that when common-law

⁹⁵ *Id.* at n.19. The Court stated:

As the issues of ultimate liability and damages are not before us, we express no opinion as to their merits. We conclude that mere compliance with agency regulations is not sufficient in itself under the Act to exempt a carrier from common-law liability. We make clear, however, that this conclusion is not intended to foreclose the courts on remand from considering, in relation to other issues in the case, evidence that the Board was fully advised of the practice complained of, and that the carrier had cooperated with the Board.

⁹⁶ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975).

⁹⁷ *Id.*; *Archibald v. Pan Am. World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972).

⁹⁸ 14 C.F.R. § 250 (1976); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *Mortimer v. Delta Air Lines, Inc.*, 302 F. Supp. 276 (N.D. Ill. 1969).

⁹⁹ *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973).

¹⁰⁰ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (D.C. Cir. 1975).

¹⁰¹ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

¹⁰² *Id.* at 299.

rights and remedies survive and the agency lacks the power to grant immunity from the common liability, the subject matter of the dispute must be analyzed to determine if the doctrine of primary jurisdiction precludes judicial determination.¹⁰³ If the issue is consistent with the business entrusted to that agency or where the legal issues are better resolved by the agency than by the courts, due to the agency's special expertise in the field, then the doctrine applies.¹⁰⁴ The principal reason for primary jurisdiction, therefore, is the need for sensible coordination of the expertise of courts and agencies. Each is best suited to resolve the subject matter for which it is best qualified.¹⁰⁵

In order for the doctrine of primary jurisdiction to bar or stay judicial adjudication, the issue must be within the agency's sphere of statutory duties.¹⁰⁶ Examples of such listed in the Supreme Court's opinion include questions pertaining to the validity of rates or tariff provisions.¹⁰⁷ If the CAB were to expressly regulate overbooking by incorporating the practice into the carrier's tariff and expressly compel the carriers to overbook, the CAB would have primary jurisdiction over the practice of overbooking.¹⁰⁸ It appears that agency regulation ordinarily can stay court adjudication. The Supreme Court, however, distinguished the subject matter of overbooking and its remedies by stating that the subject matter of overbooking is of a type that is suited to agency expertise, but that *misrepresentation and discrimination are not*.¹⁰⁹

¹⁰³ *Id.* See *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956); see also *Far E. Conf. v. United States*, 342 U.S. 570 (1952).

¹⁰⁴ See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 19.01 (3d ed. 1972).

¹⁰⁵ *Id.*

¹⁰⁶ The Agency must have subject matter jurisdiction. *Id.*

¹⁰⁷ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); see *Danna v. Air Fr.*, 463 F.2d 407 (2d Cir. 1972).

¹⁰⁸ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The recent CAB rule which requires carriers to advise the public of airline overbooking of reservations is probably insufficient to invoke the doctrine of primary jurisdiction since overbooking is not regulated by the rule; carriers are merely required to give notice of the practice. See 42 Fed. Reg. 12,420 for the text of 14 C.F.R. § 221.177 (1977).

¹⁰⁹ The Court stated:

The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the

B. The Common-Law Remedies Could Be Abrogated if Congress Were to Preempt Overbooking Remedies.

The common-law claims could be abrogated if the Federal Aviation Act's savings clause were amended so as to preempt the field.¹¹⁰ The CAB regulations providing for alternative remedies would also need to be amended.¹¹¹ The CAB could then expressly regulate overbooking to provide exclusive remedies and therefore invoke the doctrine of primary jurisdiction since the remedies would now be more appropriately determined by the agency using its technical expertise.¹¹² CAB regulation of overbooking, in the absence of abrogating the Act's savings clause, would not be sufficient to preclude common-law claims. It should be noted that the CAB has previously rejected a carrier's proposal to make the CAB remedies exclusive and thereby preclude judicial remedies.¹¹³ Therefore, due to the *Nader* case, under the Federal Aviation Act's savings clause and current CAB regulations, bumped passengers may elect either administrative or judicial relief.¹¹⁴

C. Must the Carrier Violate Its Boarding Priority Rules as a Pre-requisite to Invoking Judicial Relief?

Prior to *Nader*, carriers have infrequently been subject to punitive damages based on the statutory cause of action for discrimina-

conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

426 U.S. at 298.

¹¹⁰ "It may be that under its rulemaking authority the Board would have the power to order airline overbooking and to pre-empt the recoveries under state law for undisclosed overbooking or overselling. But it has not done so, at least as yet." 426 U.S. 290, 302 (White, J., concurring).

¹¹¹ *Id.* 14 C.F.R. § 250 (1975).

¹¹² In response to the exclusiveness of remedies, the Supreme Court stated that:

For example, if respondent's overbooking practices were detailed in its tariff and therefore available to the public, a court presented with a claim of misrepresentation based on failure to disclose need not make prior reference to the Board, as it should if presented with a suit challenging the reasonableness of practices detailed in a tariff.

426 U.S. at 298 n.14.

¹¹³ Domestic Trunklines Tariff Agreement, 35 C.A.B. 881, CAB Order No. E-18064 (1963).

¹¹⁴ 426 U.S. 290 (1976).

tion.¹¹⁵ One aspect of the *Nader* case, in addition to earlier precedent, involved discrimination resulting from failure to abide by the established boarding priority rules.¹¹⁶ A review of the earlier cases indicates that the discrimination cause of action arose from the disregard of the boarding priority rules.¹¹⁷ It seems that the boarding priority violation is a prerequisite only for obtaining damages based on the statutory discrimination claim and is not relevant for the claim of misrepresentation.¹¹⁸

The *Nader* case indicates that a claim based on misrepresentation exists. *Nader*, however, did not clearly define the elements and burden of proof, since the court of appeals reversed the district court's conclusions.¹¹⁹ It would appear that the claim for misrepresentation arises after the reservation holder is both deliberately overbooked and then denied boarding. At this juncture, he is entitled to CAB remedies or common-law remedies.¹²⁰ The additional violation of the boarding priority rules, therefore, gives rise to an independent cause of action from the misrepresentation claim.

D. The Spectre of Pandora's Box: Carriers Are Subject to Punitive Damages Both for Discrimination and Misrepresentation.

Assuming the carrier has committed a fraudulent misrepresentation or violated his boarding priority rules, the question of recoverable damages must be considered. The basic foundation of damages may be summarized as follows: "[O]ne who suffers a legally recognized wrong or injury is usually entitled to an award of

¹¹⁵ See note 2 *supra*; see Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533 (1974) and Comment, *Court Usurpation of CAB Function: The Problem of the "Bumped" Passenger*, 43 U.M.K.C. L. REV. 112 (1974) for discussions of the discrimination cases wherein punitive damages have been allowed.

¹¹⁶ See *id.*

¹¹⁷ See note 62 *supra*.

¹¹⁸ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975).

¹¹⁹ *Id.*

¹²⁰ *Id.*; 14 C.F.R. § 250 (1975). The trial court in *Nader* found that Allegheny misrepresented a material fact, whereas the Court of Appeals stated the lower court failed to define the burden of proof. The Court of Appeals stated that the accepted definition for fraudulent misrepresentation is: a false misrepresentation, in reference to a present material fact made with knowledge of its falsity, and made with intent to deceive that causes action to be taken in reliance upon that misrepresentation. 512 F.2d at 541 n.32. For a discussion of when a claim arises for misrepresentation, see W. PROSSER, LAW OF TORTS § 105, at 684-85 (4th ed. 1971) [hereinafter referred to as PROSSER, LAW OF TORTS].

damages.¹²¹ There are two major subdivisions of damages: general and special.¹²² General damages are those that naturally flow from the injury, such as actual damages, compensatory damages, nominal damages, punitive damages.¹²³ Special damages are awarded in addition to general damages to compensate the injured party for injuries caused by the defendant, but are not of the type ordinarily expected. Special damages include items of peculiar loss to that injured party.¹²⁴ Consequential damages are a subdivision of special damages.¹²⁵

Compensatory damages, such as Nader was awarded, seek to restore the injured party to his original position and include items such as actual losses arising from the tort, pain and suffering, and humiliation.¹²⁶ There are three distinct requirements for an award of compensatory damages:

- 1) the defendant's action must in fact cause the injury (overbooking obviously caused the reservation holder to be bumped);¹²⁷
- 2) the plaintiff must prove the amount of injury suffered to a reasonable degree of certainty; and¹²⁸
- 3) finally, the compensatory damages awarded must not be too remotely caused by the defendant.¹²⁹ Injuries resulting from being bumped, such as inability to address the CCAG at the advertised time, are too remote to be recovered under compensatory damages.¹³⁰ The test for remoteness is the notorious

¹²¹ DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1 (1973) [hereinafter referred to as DOBBS].

¹²² *Id.* at §§ 3.2, 3.3.

¹²³ *Id.*

¹²⁴ *Id.* See also *Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 130 F.2d 582 (9th Cir. 1942). For a discussion of instances wherein carriers have been subject to consequential damages in shipping cases, see Comment, *Consequential and Special Damages: Tempest in the Tariff*, 40 J. AIR L. & COM. 704 (1974).

¹²⁵ *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973); see *Hycel, Inc. v. American Airlines, Inc.*, 328 F. Supp. 190, 193 (S.D. Tex. 1971).

¹²⁶ *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973).

¹²⁷ DOBBS, *supra* note 121, at §§ 3.2-3.

¹²⁸ *Id.* Actual damages are easily ascertained since the most immediate injury is the denial of boarding and is compensated for by the payment of denied boarding compensation as liquidated damages for the cost of the flight. Nader was only awarded \$10.00 in compensatory damages, \$3.00 of which was for the additional cost of a ticket to Boston, the alternate flight chosen by Nader, and \$7.00 incurred in long distance phone calls. 512 F.2d at 532.

¹²⁹ *Id.* DOBBS, *supra* note 121, at §§ 3.2-3.

¹³⁰ *Id.*

proximate cause test for tort injuries and the rule of *Hadley v. Baxendale* for contractual breaches.¹³¹

Apparently, the carriers are not as concerned about the award of compensatory damages as they are with punitive and consequential damages. This is because the amount of compensatory damages approximates the liquidated damages currently provided for under CAB regulations.

Punitive damages are awarded to punish the defendant and deter future violations, and they are awarded in addition to compensatory damages.¹³² The basis of punitive damages is that the aggravated, willful, wanton misconduct should be punished as a matter of public policy.¹³³ The test for such an award is commonly that:

- 1) the plaintiff must first recover compensatory damages;¹³⁴
- 2) the award of punitive damages must be commensurate with the amount of compensatory damages and the injury sought to be redressed; and ¹³⁵
- 3) the defendant must have acted with sufficient malice or with willful, wanton conduct that mandates punishment; negligence or willful conduct alone is not sufficient to justify punitive damages.¹³⁶

Punitive damages are further limited in that:

- 1) equity will not grant punitive damages;¹³⁷
- 2) a principal is not vicariously liable for culpable torts of his servants; and¹³⁸
- 3) mass disaster litigation against one or a small number of de-

¹³¹ *Hadley v. Baxendale*, 156 ENG. REP. 145 (Ex. 1854); accord *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903); see DOBBS, *supra* note 121, at §§ 3.2-3.

¹³² DOBBS, *supra* note 121, at § 3.9; PROSSER, *LAW OF TORTS*, *supra* note 120, at §§ 209-10.

¹³³ *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 367-68 (S.D. Cal. 1961). See generally *Chesapeake & Potomac Telephone Co. v. Clay*, 194 F.2d 888 (D.C. Cir. 1952).

¹³⁴ DOBBS, *supra* note 121, at § 3.9.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

fendants shall not yield punitive damages;¹³⁹ the defendant's conduct must be directed solely toward one individual.¹⁴⁰

The particular tort is not as determinative as are the defendant's motives and conduct by which the tort was committed.¹⁴¹ The actor's motives are, therefore, crucial to the award, since mere inadvertence will not suffice to support an award of punitive damages.¹⁴²

These elementary guidelines may be applied to the overbooking situation. The district court held that the misrepresentation was of such bad faith and malicious intent that the carrier should be punished for the deception.¹⁴³ That holding was reversed and remanded for further showing of actual malice and wanton intent.¹⁴⁴ Punitive damages ordinarily require a showing of malicious intent upon a single victim. Consequently, it is extremely difficult "to perceive how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered so as to avoid an overkill." Overbooking is directed at neutralizing the impersonal no-show or reservation changes and is not specifically directed at any individual reservation holder.¹⁴⁵ Overbooking does not meet the test for maliciousness, as it is a mere error in predicting the reservations turnover. The practice of overbooking reservations also is not malicious, since carriers do not intend overbooking to result in bumped passengers. Overbooking is regarded by the CAB and most carriers as the only means of combating no-shows and reservations turnover while maintaining the flexibility of the cur-

¹³⁹ *Id.*

¹⁴⁰ Typical examples wherein punitive damages have been awarded include: assault, battery, libel, slander, deceit, seduction, alienation of affections, malicious prosecution, trespass. PROSSER, *LAW OF TORTS*, *supra* note 120, at § 2.

¹⁴¹ *Id.* See DOBBS, *supra* note 121, at § 3.9.

¹⁴² "[M]ere inadvertence or even gross negligence will not suffice to support an award of punitive damages." *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (D.C. Cir. 1975). It would seem that no punitive damages should be assessed in instances of overbooking errors due to travel agent's failure to transmit all the reservations, carrier clerical errors, etc., since this would be characterized as inadvertence rather than malicious intent. See generally *Black v. Sheraton Corp. of America*, 47 F.R.D. 263 (D.D.C. 1969). "The tort must be aggravated by an evil motive, actual malice, deliberate violence or oppression."

¹⁴³ *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973).

¹⁴⁴ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975).

¹⁴⁵ *Id.* See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

rent systems.¹⁴⁶ Most carriers assume the practice is not fraudulently misrepresentative and are justified in their belief that CAB supports and condones overbooking.¹⁴⁷ Given CAB tacit support, how can a nondisclosure of overbooking practices to the reservation holders equal individually directed, wanton, malicious conduct that deserves punishment?¹⁴⁸

Punitive damages have been awarded, and rightly so, in cases wherein the carrier's agent unjustly discriminated against an individual reservation holder.¹⁴⁹ When a carrier breaches his boarding priority rules in a manner that the reservation holder is subjected to malicious discrimination, the traditional test for punitive damages is met.¹⁵⁰

Wills v. Transworld Airlines, Inc. introduced the award of punitive damages for unjust discrimination.¹⁵¹ In *Wills*, an economy passenger was denied a seat on an oversold flight so that the airline could accommodate all of its first class passengers. The airline intentionally violated its boarding priority rules and maliciously refused to verify the bumped passenger's statement that he had conformed to the carrier's reservation rules.¹⁵² The plaintiff based his action on the discrimination section of the Federal Aviation Act.¹⁵³ The court held that specific statutory authority to bring the action is not an essential prerequisite to the existence of a federal court's power to grant relief by damages in order to enforce the intent of the statute.¹⁵⁴ Primary jurisdiction was no bar, since the discrimination involved subject matter most appropriately reserved to the courts and not to the CAB.¹⁵⁵

¹⁴⁶ See the Comments of Delta, National, and Allegheny Airlines, *supra* notes 8, 25, 16; CAB ERPI, *supra* note 2; CAB EDR-109, *supra* note 2.

¹⁴⁷ CAB ERPI, *supra* note 2. The administrative law judge stated: "It is clear from the record as the Board has previously recognized, deliberate overbooking is neither inherently evil nor necessarily adverse to the public interest."

The basis of his finding and previous other carrier investigations have led the carriers to believe overbooking is condoned by the CAB; this belief is reflected in the Carriers' Comments, *supra* notes 8, 16, 25.

¹⁴⁸ See *id.*

¹⁴⁹ 49 U.S.C. § 1374 (1970).

¹⁵⁰ 14 C.F.R. § 250 (1975).

¹⁵¹ 200 F. Supp. 360 (S.D. Cal. 1961).

¹⁵² *Id.*

¹⁵³ 49 U.S.C. § 1374 (1975).

¹⁵⁴ 200 F. Supp. at 364.

¹⁵⁵ *Id.*

An essential finding of the court's reasoning in the *Wills* case was that the deprivation of contractual rights of an airline passenger by unreasonable and unjust discrimination in removing him from a flight on which he had priority exhibited an "entire want of care" for the rights of passengers which had substantially oversold reservations on a number of flights and amounted to tortious conduct by the company.¹⁵⁶ The passenger was entitled to punitive damages of \$5,000; the court held the carrier liable for tortious discrimination arising from a contractual obligation.¹⁵⁷ The conduct that justified the award of punitive damages in *Wills* was the carrier's refusal to verify the plaintiff's assertion that he had complied with the carrier's rules and was entitled to priority. The refusal to permit the plaintiff to board despite prior confirmation exhibited an "entire want of care" for the right of the passenger to travel without unreasonable discrimination.¹⁵⁸ The award of punitive damages was further justified because the carrier "acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations."¹⁵⁹

Later cases have imposed a stricter burden of proof to justify the award. In *Kaplan v. Lufthansa German Airlines*, the carrier also disregarded its priority rules but the court awarded only compensatory damages for the unjust discrimination and disallowed the punitive award.¹⁶⁰ The case stands for the proposition that overbooking itself, even if deliberate, does not justify the award of punitive damages absent a showing of malicious intent.¹⁶¹

The trend continued and was clarified by *Mortimer v. Delta Air Lines, Inc.*, where the court held that a cause of action may be based on the discriminatory tort, but not for breach of contractual duty:

The basis of this action is not breach of contract of carriage which is the basis of (liquidated damages) denied boarding compensa-

¹⁵⁶ *Id.* at 367.

¹⁵⁷ *Id.* at 368.

¹⁵⁸ *Id.* at 367.

¹⁵⁹ *Id.* (quoting *Lake Shore M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893)).

¹⁶⁰ *Kaplan v. Lufthansa German Airlines*, 12 Av. Cas. 17,933 (E.D. Pa. 1973).

¹⁶¹ *Id.* at 17,935.

tion, but rather violation of the antidiscrimination and preference section of the Federal Aviation Act. Denied boarding compensation is payable to a passenger . . . regardless of whether he has been the victim of discrimination or undue preference.¹⁶²

Mortimer also stands for the proposition that a bumped passenger is eligible for denied boarding compensation under breach of contract, but the judiciary remedy is pursued as a tort cause of action for the discrimination exhibited in the violation of the boarding priority rules.¹⁶³ The court stated that the public policy of allowing recovery of punitive damages was that the Federal Aviation Act established a "public interest and right to nondiscriminatory and fair treatment by air carriers and that in the absence of a civil remedy past injuries caused by violation of that right would go uncompensated."¹⁶⁴ *Mortimer* also decided that the statutory discrimination cause of action may be pursued in lieu of the CAB remedies which were not available when *Wills* was decided.¹⁶⁵ The court stated the CAB remedies were based on a breach of contract of carriage,¹⁶⁶ while the statutory cause of action was based on a tort claim. The purpose of the CAB remedy was to compensate for being denied boarding, while the purpose of the statutory cause of action was to punish the carrier for his conduct. The court stated:

This remedy is not equivalent to or an expansion of denied boarding compensation under the regulations. It provides redress for injury caused by discrimination, disadvantage or undue preference whether racially, religiously, or economically motivated or that results from the carrier's disregard for its own priority rules or from the fact that those rules themselves are in themselves discriminatory. . . . The denied boarding compensation . . . was not intended to be the exclusive remedy.¹⁶⁷

Additional bumped passenger litigation may be forthcoming in light of *Smith v. Piedmont Aviation, Inc.*¹⁶⁸ The facts in this case were similar to *Nader* and the other discrimination cases discussed above. The reservation holder in *Smith* was bumped

¹⁶² 302 F. Supp. 276, 281 (N.D. Ill. 1969).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 279.

¹⁶⁵ *Id.* at 280-81.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 412 F. Supp. 641 (N.D. Tex. 1976).

from an overbooked flight and discriminated against by the carrier's failure to obey its boarding priority rules.¹⁶⁹ The cause of action also alleged fraud under the Texas Deceptive Trade Practices Act.¹⁷⁰ The court awarded punitive damages because the agent was instructed to disregard its boarding priority rules if adherence would delay the flight.¹⁷¹ The agent rudely insulted the plaintiff and maliciously refused to remove the passenger's luggage from the plane.¹⁷² The court held that the rudeness and overbooking did not constitute fraud or deceptive practices under the Texas statute.¹⁷³

It appears fairly clear that punitive damages are not allowed unless the boarding priority rules are ignored. In *Stough v. North Central Airlines, Inc.*,¹⁷⁴ punitive damages were disallowed when the carrier bumped the reservation holder due to bad weather, despite the fact the flight was overbooked. It should be noted that there was no violation of the boarding priority rules.¹⁷⁵

The burden of proof necessary to recover punitive damages was stated in *Archibald v. Pan American World Airways, Inc.*; the court perceived both *Wills* and *Stough* to stand for the proposition that punitive damages are only allowed when the carrier disregards its boarding priority rules.¹⁷⁶ A *prima facie* case is established when the plaintiff proves the carrier departed from his boarding priority rules, at which time the burden shifts to the carrier to show an absence of discrimination to rebut the plaintiff's *prima facie* case.¹⁷⁷

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* TEX. BUS. & COM. CODE ANN. § 17.01 *et seq.* (1970).

¹⁷¹ 412 F. Supp. at 642-43.

¹⁷² *Id.* at 643.

¹⁷³ *Id.* The CAB is currently requesting comments concerning the issuance of a policy statement regarding overbooking as a deceptive trade practice. See note 1 *supra*. The deceptive trade provisions of the Federal Aviation Act of 1958 have been construed to have a broader concept than the common-law idea of unfair practices and unfair competition. Federal Aviation Act of 1958, § 411, 49 U.S.C. § 1381 (1970). The provision is for antitrust investigations and is distinguished from the basis of Nader's cause of action based on the common-law claim of misrepresentation.

¹⁷⁴ 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

¹⁷⁵ *Id.* at 797.

¹⁷⁶ 460 F.2d 16 (9th Cir. 1972). See *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961); *Stough v. North Central Airlines, Inc.*, 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

¹⁷⁷ 460 F.2d 14, 17 (9th Cir. 1972).

An airline may establish rules for determining which passengers to bump so long as the individual is not subject to unjust discrimination. For instance, a carrier may base its priority on the passenger's check-in time, as opposed to the standard policy of earliest reservation booking date.¹⁷⁸

It appears that if punitive damages were more freely awarded, a drop in airline revenues would be inevitable and the consumer would eventually bear the cost.¹⁷⁹ It is, therefore, consistent with public policy to limit the award of punitive damages only to the discrimination situations and not extend the award also to the common-law claim of misrepresentation. The CAB itself has stated no public policy would be furthered by such an award because:

The airline passenger has substantial freedom of choice to make reservations . . . and to cancel them [H]e is free . . . to use his ticket on flights of other air carriers without endorsement. A system with such built-in mobility for the passenger inevitably breeds the deliberate no-show who, in times when airline seats are in short supply, will undertake to protect himself by making multiple reservations which he is free to disregard with impunity.¹⁸⁰

It would therefore appear that on remand the district court in *Nader* should not allow punitive damages based on the common-law fraudulent misrepresentation claim. To allow punitive damages would abrogate the finding of the court of appeals that there was no evidence to support an affirmative finding of misrepresentation and that overbooking was a nondisclosure rather than a misrepresentation.¹⁸¹ There was also an absence of malice which is a prerequisite for the award since the carrier assumed overbooking was not a deceptive trade practice pursuant to the CAB investigations.¹⁸²

E. The Ultimate Liability: Consequential Damages

Since the Supreme Court did not consider the issue of consequential damages in *Nader*, it is foreseeable that a later court could

¹⁷⁸ See note 62 *supra*.

¹⁷⁹ Brief for the ATA, *supra* note 2, at 20; CAB ERPI, *supra* note 2, at 8-9.

¹⁸⁰ Brief for the ATA, *supra* note 2, at 21-22, citing CAB ERPI, *supra* note 2, at 8-9.

¹⁸¹ 512 F.2d at 551, 553.

¹⁸² Brief for ATA, *supra* note 2, at 17, citing CAB ERPI, *supra* note 2, at 54.

sustain such an award.¹⁸³ Consequential damages could be awarded to the bumped passenger for losses incurred as a result of being bumped.¹⁸⁴ Consequential damages could also be awarded to unforeseen plaintiffs also relying on that passenger's reservation. It should be noted that the court of appeals in the *Nader* case stated that the question of consequential damages awarded to bumped passengers was one of first impression.¹⁸⁵

The issue of an unforeseen plaintiff, as an aspect of consequential damages under the proximate cause test, arose in 1928 in the case of *Palsgraf v. Long Island Railroad*.¹⁸⁶ The case has become one of the most debated tort cases.¹⁸⁷ The case has been cited in support of the familiar rule that a statute intended to protect a particular class of persons or guard against a particular risk or harm creates no duty to any other class, such as an unforeseen plaintiff.¹⁸⁸ Later cases seem to adhere to the policy of strict statutory construction answered in *Palsgraf* and continue to refuse to extend the scope of the statute beyond the narrow legislative purpose.¹⁸⁹ The Federal Aviation Act seeks to create safe and efficient air carriage and does not render the carrier an insurer of the reservation holder's purpose in making the reservation, according to *Nader*.¹⁹⁰ The court of appeals correctly held that the CCAG was not within the class

¹⁸³ 426 U.S. 290.

¹⁸⁴ Cases are being filed against carriers for consequential damages. An interesting example is as follows:

Howard Card has filed a \$25,000 damage suit in Newark, N. J., against KLM Royal Dutch Airlines for bumping him off a plane and making him miss the biggest event of his life—his inauguration as mayor of Riverdale, N. J. The mayor, who was elected to the part-time post last November, filed the federal suit against KLM because he was unable to get home in time for his inauguration Jan. 3. Card, 54, said he went to Aruba in the Caribbean for a vacation and expected to board a plane home Jan. 2. But he said officials told him there were no seats left on the plane. The mayor of the town of 3,000 said he was forced to stay overnight and cancel the inauguration, an action he said caused 'irreparable damage to his reputation and esteem.'

¹⁸⁵ "Apparently, the question of third party recovery for fraudulent misrepresentation is virtually one of first impression . . ." 512 F.2d at 547.

¹⁸⁶ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); see PROSSER, LAW OF TORTS, *supra* note 120, at 254.

¹⁸⁷ PROSSER, LAW OF TORTS, *supra* note 120, at 254.

¹⁸⁸ *Id.* at 255.

¹⁸⁹ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 547 (D.C. Cir. 1975).

¹⁹⁰ *Id.*; Brief for the ATA, *supra* note 2.

of persons that the act sought to protect. Prior to *Nader*, no express public duty had been imposed on the carrier with regard to guaranteeing reliance on reservations by third persons.¹⁹¹ Without such an express duty, there is no justification which would warrant the imposition of strict liability that would result if the carrier had to pay consequential damages to unforeseen plaintiffs.

The court of appeals in *Nader* also stated that no public policy would be furthered by an award of consequential damages to CCAG.¹⁹² The court desired to keep tort liability within its current bounds by refusing the award of consequential damages because the level of the carrier's culpability or fault in overbooking is too disproportionate to the liability imposed by consequential damages.¹⁹³ Since the carrier overbooks to abate a chronic industry problem of no-shows and reservation turnovers, and the reservation holders themselves cause that problem yet are under no duty to honor any reservations made, the carrier should not be held liable to distant persons relying on the unconstrained reservation maker.¹⁹⁴ A duty should not exist to insure reservations since many passengers take advantage of the current reservations flexibility by multiple-booking so that they will have a reservation when their personal schedule permits. This conduct causes other persons to be bumped and is a major cause of the no-show problem.¹⁹⁵ It is, therefore, extremely difficult to see how a "non-representation" to the reservation maker can warrant consequential damages to third persons since the carrier has no contact with, or owes any duty to, unforeseen plaintiffs.

The carrier also should not be liable to the bumped passenger for his consequential losses incurred as a result of being bumped, since traditional detrimental reliance causes of action have been associated with affirmative or fraudulent misrepresentations.¹⁹⁶ An award of consequential damages would give the reservation holder not only the transportation for which there is consideration, but

¹⁹¹ Brief for the ATA, *supra* note 2.

¹⁹² 512 F.2d at 549.

¹⁹³ *Id.*; Brief for the ATA, *supra* note 2.

¹⁹⁴ The court of appeals stated the statute was intended to protect passengers, not third persons. 512 F.2d at 533.

¹⁹⁵ CAB ERPI, *supra* note 2; *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975); Delta's Comments, *supra* note 8.

¹⁹⁶ PROSSER, LAW OF TORTS, *supra* note 120; DOBBS, *supra* note 121.

would guarantee compensation for consequential losses if the passenger were bumped. The burden of proof for such special damages is more stringent than the proof required for general damages, *e.g.*, compensatory damages.¹⁹⁷ If consequential damages were allowed, all the plaintiff would have to prove is that he was denied boarding, regardless of the reason. He could then presumably recover any possible loss. The requirement of proving damages with a reasonable degree of certainty could be emasculated if the plaintiff could recover for the loss of business transactions not yet finalized, grief suffered for the loss of not comforting a dying relative, or any other infinite range of reasons for making reservations. Consequential damages have been defined as those which follow pursuant to special conditions imposing a higher than normal degree of care.¹⁹⁸ The duty of care in honoring reservations should not be that high unless the reservation holder is also under some obligation to honor his own reservation.

The court of appeals correctly held that the unforeseen plaintiff does not have standing to sue for consequential damages and that the passenger's losses due to being bumped are too remote for consequential damages.¹⁹⁹ It is unfortunate that a loss should occur due to being bumped and go without compensation, but the nature of that loss is one that must go uncompensated. Dean Prosser reasons that the real problem in proximate cause and unforeseen plaintiff situations is one of social policy: whether the defendant, who has "deeper pockets" than the plaintiff, should bear the losses incurred as a result of a highly complex, fluid civilization because the defendant can presumably better afford such losses.²⁰⁰

VI. CAB'S RESPONSE TO THE NADER CONTROVERSY

Due to the confusion resulting from *Nader* and increasing consumer dissatisfaction with the current CAB position on overbook-

¹⁹⁷ DOBBS, *supra* note 121, at § 3.2.

¹⁹⁸ *Id.* See also *Trammel v. Eastern Airlines, Inc.*, 236 F. Supp. 75 (W.D.N.Y. 1955) (wherein the court said that in the absence of special knowledge of special circumstances on the part of the carrier, the plaintiff may not recover for special damages).

¹⁹⁹ 512 F.2d 527.

²⁰⁰ PROSSER, *LAW OF TORTS*, *supra* note 120, at 257. For a general discussion concerning duty and standard of care, see Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 28 (1953).

ing, it is not surprising that the Supreme Court inferred that overbooking practices might require further investigation by the CAB.²⁰¹ Since the inception of Nader's litigation, the CAB has decided to re-examine its policies concerning overbooking and is considering a proposal to allow carriers to amend their tariffs so that notice of overbooking would be given to the public.²⁰²

The CAB recently promulgated the following notices and proposed rules in the Federal Register:

- 1) The CAB announced "A Notice of Intent to Re-examine CAB Policies Towards Deliberate Overbooking Practices." The CAB requested the carriers file statistical reports concerning the overbooking practices and causes of oversales. The deadline for submission of these comments was delayed due to the complexity of compiling the requested data.²⁰³
- 2) Simultaneously with the notice of intent to re-examine its policies concerning overbooking, the CAB issued a notice of proposed rule-making to determine if changes in the existing regulations are required. The CAB requested comments from both the general public and persons who would be affected by changes in the regulations.²⁰⁴
- 3) The CAB requires carriers to post and distribute notices advising the public of airline overbooking of reservations. The notice must be displayed in a conspicuous public place such as the ticket counter. The notice must also be distributed to the passengers. The CAB also requires the carriers to ensure that travel agents comply with the actual notice requirement.²⁰⁵

The CAB stated in the preamble to its proposed rule-making

²⁰¹ 426 U.S. at 290.

²⁰² CAB EDR-303, 41 Fed. Reg. 40,500 (1976).

²⁰³ CAB EDR-296, *supra* note 1. The date originally requested by the CAB was on or before April 26, 1976, which was a period of less than two weeks after the issuance of the request. Several carriers including Allegheny and TWA requested a hearing on the subject of overbooking prior to the submission of the reports. On September 14, 1976, the CAB denied TWA's motion. The CAB postponed the requirement for furnishing data until the Board could review and evaluate the public comments received. 41 Fed. Reg. 20,008 (Apr. 19, 1976).

²⁰⁴ The CAB consolidated its Re-examination of Overbooking, EDR-296, with the carrier's request to give notice of overbooking to the public. This action was taken as a result of the Nader case. *See* 41 Fed. Reg. 40,543 (Sept. 20, 1976); Allegheny's Comments, *supra* note 16; CAB EDR-296, *supra* note 1.

²⁰⁵ 42 Fed. Reg. 12,420 (1977). *See* note 36 *supra*.

notice that it has not undertaken any fundamental study of the problem of overbooking since the adoption of the 1967 Boarding Priority Rules.²⁰⁶ Since the 1967 amendments, the Board has appeared to sanction overbooking, and the carriers' general attitude towards overbooking has been that it was not an unfair or deceptive trade practice.²⁰⁷ Since the CAB did not undertake to regulate overbooking itself and only provided a remedy for bumped reservation holders, it has created a regulatory gap in its coverage of carriers' activities.

The reason for the regulatory gap in overbooking relates to the nature of the overbooking dilemma itself: can a flexible, non-committal reservations system be maintained without no-shows? It therefore appears exceedingly difficult to solve the dilemma due to the definition of the problem. An additional reason for the regulatory gap is the two policy alternatives that the CAB has to choose between:

- 1) Overbooking should be eliminated by enforcing a rigid reservations system which would destroy the current flexibility in making reservations by imposing a fine, forfeiture, or subsidy on the no-shows; or
- 2) Overbooking should be condoned as the only method to combat the no-show problem created by a flexible reservations system. By condoning overbooking, the only regulations possible would be to provide compensation to bumped passengers and place controls on overbooking to prevent abuses of the practice and mitigate its consequences.²⁰⁸

As mentioned earlier, the CAB had been unsuccessful in its prior attempts to solve the dilemma; the Board has therefore adopted the latter policy alternative in order to preserve reservations flexibility.²⁰⁹

Carriers have requested the CAB to regulate overbooking and to allow the carriers to amend their tariffs so that the consumer may be advised of the overbooking practices.²¹⁰ The CAB has re-

²⁰⁶ CAB EDR-296, *supra* note 1; CAB EDR-109, *supra* note 2; 14 C.F.R. § 250 (1967); CAB ERPI, *supra* note 2.

²⁰⁷ CAB EDR-296, *supra* note 1.

²⁰⁸ *Id.*

²⁰⁹ *Id.*; Brief for the ATA, *supra* note 2.

²¹⁰ See Delta's Comments, *supra* note 8; see note 92 *supra* for a reference to the requests. See note 36 *supra*.

jected the requests because a mere tariff change would amount to constructive notice of the practice, possibly foreclosing the common-law cause of action based on fraudulent misrepresentation.³¹¹ The CAB has, therefore, decided to consider the requests to amend the tariff jointly with the proposed rule-making inquiring into the need for changes in the current overbooking regulations.³¹² The CAB has suggested, in a notice of proposed rule-making, that the carriers could amend the tariff to give notice of overbooking only if actual notice could be given to the consumers.³¹³ The actual notice proposed by the CAB would consist of conspicuously displayed signs and individual distribution of printed notices on a separate piece of paper delivered with the ticket.³¹⁴ Such a procedure would discharge the legal limitations for which the carriers are liable.³¹⁵ The proposal would not prohibit carriers from providing additional explanatory information in conjunction with the required notices, such as a statistical table recording the frequency of bumped passengers.³¹⁶ The proposal considers a requirement that the carrier's agents give verbal notice of the overbooking practice when a person makes reservations by phone. CAB's initial response, however, has been that the confusion caused by such a verbal notice would outweigh its possible benefits.³¹⁷

The CAB's proposal as implemented will not solve the problems associated with overbooking, such as no-shows. The proposal and subsequent rule, along with previous CAB attempts, only address remedies available after the problem has surfaced. The rule is seriously defective because persons making telephone reservations will not receive notice of overbooking until after they have made their reservations and anticipate boarding.³¹⁸ Notice at that time will cause consumer apprehension. If actual notice is required at the time of making the reservation, the apprehension will be perpetu-

³¹¹ See note 92 *supra*.

³¹² *Id.*

³¹³ 41 Fed. Reg. at 40,501. See note 92 *supra*. The proposed rule became effective April 3, 1977. 42 Fed. Reg. 12,420 (1977).

³¹⁴ *Id.*

³¹⁵ See 14 C.F.R. §§ 221.174-176 (1975).

³¹⁶ See 41 Fed. Reg. at 40,501; see note 92 *supra*.

³¹⁷ *Id.* The rule as adopted does not require verbal notice, only the posting and distribution of the notice. 42 Fed. Reg. 12,420 (1977).

³¹⁸ *Id.*

ated until the passenger boards the plane and will cause the passenger to multiple-book. The problem of no-shows due to multiple booking of reservations will be greatly increased. It is difficult to see why consumers should be expected to accept such a proposal, because it could possibly destroy the common-law cause of action based on misrepresentation yet allow the consumer to continue to be overbooked. The carriers would therefore have a license to overbook and could abuse that privilege without incurring any penalties except the payment of denied boarding compensation, which is slightly more than a refund of the price of the flight.

The proposal promulgated by the CAB also has another serious deficiency. Carriers would not be required to amend their tariffs and therefore would not be required to give notice of the overbooking practices.²¹⁹ This would lead consumers to believe that a carrier who does not give notice of overbooking does not engage in overbooking, since other carriers issue notice of their overbooking practices. The cause of action based on misrepresentation, therefore, would be further litigated.

A review of the comments submitted by the carriers in response to the CAB request for comments concerning the CAB proposal and problems associated with overbooking illustrates the need for a solution to the overbooking dilemma.²²⁰ Allegheny Airlines stated in its comments that the problems raised by overbooking "are greatly exaggerated and do not warrant *any* changes in the current procedures. Despite the hue and cry from a handful of attention-motivated consumer groups, there is no public alarm over denied boardings as a result of oversales."²²¹ Allegheny further requested the CAB to refrain from stating that overbooking is deceptive, because Allegheny feels "the incidence of oversales is *de minimus* and little would be accomplished by attempting to seek the various causes for oversales with a view toward eliminating those causes which could be identified and controlled."²²² The comments appear to mean that the CAB should not attempt to seek a solution to a chronic problem. This view would seem to request a perpetuation of the problem.

²¹⁹ *Id.*

²²⁰ *Id.* See notes 8, 16, 25 *supra*.

²²¹ Allegheny's Comments, *supra* note 16.

²²² *Id.*

National Airlines' comments are a little more enlightening but continue to perpetuate the problem. National recommends the setting of a permissible bumping rate based on the industry average with any deviation from that norm warranting investigation.²²³

Perhaps the comments submitted by Delta are representative of the industry feeling "that there are no acceptable alternatives to overbooking as a means of coping with the problems of no-shows and reservations turnover."²²⁴ Delta advocates maintaining the current system with the modification of giving notice to the public of overbooking problems through carrier tariffs.²²⁵ Delta feels the carrier should not be required to offer guaranteed reservations if overbooking is disclosed.²²⁶

Any of the above solutions, either CAB or carrier, would ineffectually abate the problems raised by *Nader*. The CAB would not have primary jurisdiction over the elements that a cause of action would be based on—discrimination or misrepresentation. Passengers would continue to be bumped, violations of the boarding priority rules would continue, and carriers would be subject to more awards of punitive damages. Additionally, the public policy reasons for denying consequential damages may erode due to the failure to consider solutions to the overbooking dilemma. The CAB's responses to *Nader* seem doomed to fail, since previous attempts to regulate the consequences but not the causes of overbooking have failed, and the CAB is still faced with the same policy alternatives.²²⁷

VII. HOPE FROM WITHIN PANDORA'S BOX: SOLVING THE OVERBOOKING DILEMMA

A. *Previous Attempts to Solve the Overbooking Dilemma*

It seems painfully obvious that the airline industry and the CAB have abandoned the search for any new workable solution.²²⁸ Four

²²³ National's Comments, *supra* note 25, at 2.

²²⁴ Delta's Comments, *supra* note 8, at 9.

²²⁵ *Id.* at 17; *Petition of Delta Air Lines, Inc. For Reconsideration and/or Clarification of Orders 76-9-72 and 76-9-73*, CAB Docket Nos. 29139, 29641, 29776 (Sept. 24, 1976).

²²⁶ *Id.* at 10.

²²⁷ CAB EDR-109, *supra* note 2; EDR-296, *supra* note 1.

²²⁸ Delta's Comments, *supra* note 8, implies that there is no solution to the no-show problem; National's Comments, *supra* note 25, at 3, concurs by saying

clear categories of solutions have emerged from the past thirty years of unsuccessful attempts to regulate overbooking.

- 1) Carriers have charged a penalty for no-shows.²²⁹
- 2) Carriers have required a forfeiture of part of the purchase price for no-shows or late cancellations.²³⁰
- 3) Carriers have used standby or contingent fares to replace the vacancies caused by no-shows.²³¹
- 4) The previous attempts have been abandoned in favor of the current systems of merely providing remedies to bumped passengers.²³²

A quick review of these approaches will illustrate the reasons for their failure. The major stumbling blocks to the above solutions are consumer resentment, carrier eagerness to avoid consumer dissatisfaction and consequential failure to fully enforce penalties or forfeitures, and nonuniform application of the proposed solutions which resulted in competitive advantages to the carriers exempt from enforcing the solutions.²³³ Any workable solution to the dilemma must therefore retain the flexibility in reservations without imposing penalties or forfeitures, must be applied uniformly to all carriers, and must circumvent the need for overbooking. More importantly, as history illustrates, any workable solution must seek to solve the causes of bumping rather than merely provide remedies.

The first proposal was the institution of penalties. This plan was the least liked and least successful of all the solutions, since it destroyed the complete flexibility that consumers like about the airline reservation system and incurred the ill will of the penalized reservation makers.²³⁴ This gave competitor airlines a distinct advantage. The plan mitigated the need to overbook, since the carrier retained the penalty to *compensate for departing with an*

the CAB cannot order elimination of human errors; Allegheny's Comments, *supra* note 16, at 5, says the oversales problems questioned by the Nader case are *de minimus* and should not require changing the present system. The carrier's assumptions are based on the CAB's history of unsuccessful attempts to regulate overbooking or provide a better solution.

²²⁹ Brief for the ATA, *supra* note 2.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* Delta's Comments, *supra* note 8, at 9.

²³⁴ Brief for the ATA, *supra* note 2.

*empty seat.*²³⁵ The first such plan emerged in 1946 and expired one year later.²³⁶ It provided a penalty of \$2.50 or twenty-five percent, whichever was greater, if the reservation was not cancelled at least three hours before departure and was not honored by the reservation holder.²³⁷ The plan did not fully compensate the carriers nor did it solve the no-show problem. Similar plans were proposed in 1956 and 1957, both of which were also abandoned.²³⁸ The latest penalty plan was proposed in 1974. It provided for a fine up to \$100 for no-shows and was also quickly abandoned.²³⁹

The second type of solution required a fully-paid ticket as a prerequisite to a confirmed reservation.²⁴⁰ A total refund was allowed if the reservation was cancelled prior to seventy-two hours preceding departure.²⁴¹ No-shows were penalized twenty-five percent of the fare.²⁴² Another such plan, proposed by Eastern Airlines and submitted in 1960, allowed cancellation up to twenty-four hours prior to departure.²⁴³ Similar plans proposed in 1962 were also abandoned due to consumer resentment and nonuniform application.²⁴⁴

The third and most ingenious plan, also devised by Eastern Airlines, established a third type of ticket called "The Leisure Class."²⁴⁵ The Leisure Class fare is a conditional reservation whereby the carrier offered a preferred standby status to persons who agree to be bumped if the plane was overbooked.²⁴⁶ Eastern continued to accept first class and coach reservations. The number of Leisure fares sold was supposed to replace some of the reservations lost due to no-shows and changes. The Leisure customer would pay the regular coach price and be accorded a coach or first class seat after all other passengers had boarded. If he could not be accommodated on his desired flight, he was tendered a

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ CAB ERPI, *supra* note 2.

²⁴⁰ Brief for the ATA, *supra* note 2.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* See 25 AV. WEEK & SPACE TECH. 20 (1955).

²⁴⁵ Brief for the ATA, *supra* note 2.

²⁴⁶ *Id.* Delta Air Lines, Inc. v. CAB, 455 F.2d 1340 (D.C. Cir. 1971).

refund, and then flown to his destination free on the next available flight.²⁴⁷ This was not discriminatory to the first class or coach passengers since the Leisure customer undertook the risk of delay in hopes of a free flight and therefore "assumed the risk" of being bumped. This reduced the risk that first class and coach passengers would be bumped.²⁴⁸

B. A Solution to the Dilemma

A proposed solution is now submitted to circumvent the dilemma. The proposed solution avoids the dilemma by modifying the current system so that overbooking is limited solely to a class of reservation holders who agree to assume the risk of being bumped as consideration for the benefits limited to the conditional fare.

Current CAB regulations and carrier tariffs should be amended to reflect the following:

- A) Deliberate overbooking should be limited to conditional reservations.
- B) A third type of conditional reservation should be imposed as a substitute for the overbooking of first and coach reservations. The conditional reservation would be similar to the Leisure Class concept. The conditional reservation would be a reservation that could be made any time prior and up to departure. The conditional fare would be the same price as coach, but the conditional reservation holder would accept the risk of being bumped in consideration for a refund of the ticket price and a free flight on the next available flight. The conditional reservation holder would, therefore, receive a reservation. If space permitted on the reserved flight, he would depart on that flight, but if the flight was overbooked as to the conditional reservation holders, he would then receive what he gambled for: a free flight. The conditional passenger would be distinguished from the standby fares in that there is no discount on the conditional fare as exists for standby fares. The standby passenger currently has no guarantee of being accommodated. If no vacancies appear, he is denied boarding regardless of the time lapse between purchase of the ticket and hopeful departure. The conditional passenger does have a reservation,

²⁴⁷ *Id.* at 1348.

²⁴⁸ *Id.*

subject to being bumped, and is guaranteed a space on the next available flight. The conditional fare may not be attractive to persons with rigid schedules, but would be desirable for persons who can afford to miss one flight in return for a free flight.

- C) Overbooking should be imposed on the conditional class.
- D) The current Capacity Management Programs and booking curve predictions could then be applicable to the conditional class. Present limitations and control of abuses on overbooking would therefore be shifted to the conditional class.²⁴⁹
- E) All passengers must be given actual notice of the overbooking policy at the time of making the reservation. Conditional passengers must assume the risk of being bumped as consideration for the chance of a free flight. First class and economy passengers would be advised that they are not subject to deliberate overbooking. However, the carrier shall not be liable for consequential losses incurred in the event that a passenger is denied boarding due to weather conditions, errors in transmitting and receiving reservations, etc. If, for the above reason, a first class or economy passenger is denied boarding, his compensation would be the current liquidated damages. Since there would be no misrepresentation, due to actual notice and constructive notice in the tariff, no cause of action based on misrepresentation could lie. For all practical purposes, the CAB remedy would become an exclusive remedy notwithstanding the preservation of common-law remedies by the Federal Aviation Act.²⁵⁰
- F) If conditional passengers are overbooked, and consequentially bumped, then the order of boarding priority shall be based on the time at which they arrived at the ticket gate. Current boarding priority rules would need to be amended to reflect this order of priority, since many priority rules are currently based on the time of making the reservation.

The proposed system would operate as follows:

Assume the plane holds twenty first class and eighty coach seats.

²⁴⁹ Carriers would still be required to submit CAB form 251. See 14 C.F.R. § 250 (1975).

²⁵⁰ 49 U.S.C. § 1506 (1970); see note 59 *supra*.

Under the current system, if thirty reservation vacancies are anticipated by the booking curve, one hundred thirty reservations are accepted. Both first class and coach passengers are subject to being overbooked and bumped. Under the proposed solution, only twenty first class and eighty coach reservations would be accepted; these passengers would not be subject to being bumped. The carrier would also accept thirty conditional reservations. If the booking curve prediction of thirty reservation turnovers or no-shows was correct, the plane would depart at full capacity of one hundred passengers without any bumping. If, however, only twenty instead of thirty reservations changed, then ten conditional reservation holders would be bumped and given a free flight on the next available flight. It is unlikely that all twenty first class and sixty coach passengers would show up or that the booking curve grossly overestimated the number of reservation changes. If the unlikely event were to occur, however, the proposed solution would benefit the consumer by preventing unsuspecting first class or coach passengers from being bumped and subjecting the carrier to common-law or statutory liability under the discrimination claim if the boarding priority rules were broken. The current system would subject the carrier to punitive damages, since it is foreseeable that the carrier would breach his boarding priority rules.²⁵¹ The proposal circumvents that possibility. The current system would also require payment of denied boarding compensation if common-law claims were not pursued, while the proposal allows the carrier to delay the payment by giving the conditional passenger a seat on a later flight which might have departed with vacant seats anyway.²⁵² The maximum liability the carrier would face under the proposal would be the payment of denied boarding compensation to conditional passengers who decide not to wait for a free flight. This is certainly more economical than being subject to punitive damages.

It is also unlikely, under the proposed solution, that the carrier could be subject to punitive damages under any theory of discrimination, since the boarding priority rules would require conditional

²⁵¹ *Smith v. Piedmont Aviation, Inc.*, 412 F. Supp. 641 (N.D. Tex. 1976).

²⁵² The definition of next available flight could be defined as the next flight after the conditional passenger was bumped or the next flight wherein empty seats are available. The latter definition would approximate the current standby fare while the first definition would be more novel, more attractive to the consumer, and would also aid the proposal's success from a marketing standpoint.

passengers to be boarded after the first class and coach passengers. The bumping order for the conditional passengers would therefore be such that the carrier would not have to delay a flight in order to follow its boarding priority rules. A carrier could not be liable to a bumped passenger based on the discrimination claim unless he violated the boarding priority rule. Therefore, no cause of action could be asserted.

C. THE PROPOSED SOLUTION SHOULD BE ADOPTED SINCE IT BOTH PRESERVES THE FLEXIBILITY OF THE CURRENT SYSTEM AND AVOIDS THE CONSEQUENCES OF *Nader*.

The proposed solution does not solve the no-show problem but circumvents the overbooking dilemma, since the basis for the common-law and statutory claims, such as misrepresentation and discrimination, are precluded from arising. The doctrine of primary jurisdiction would take overbooking out of the uncertain tort realm and place it in the contract arena, since the tariff incorporation and CAB regulation would give the CAB subject matter jurisdiction over both overbooking and its remedies.²⁵³ The issues of misrepresentation and discrimination, which are not subject to primary jurisdiction, would no longer be relevant. The no-show problem itself would be mitigated under the proposed solution since one of its major causes, multiple reservations, would be reduced. There would no longer be any incentive to multiple-book in order to insure against being bumped. Of course, passengers with uncertain schedules will probably continue to make multiple reservations on successive flights, since the time of their departure is not certain. The proposed solution, however, can easily cope with this problem and still preserve the flexibility that allows consumers to continue multiple-booking for the sake of convenience.

The spectre of the unforeseen plaintiff and damages for losses incurred as a result of being bumped would also be abrogated by the proposal. The rule of *Hadley v. Baxendale* would bar consequential damages because the parties did not contemplate the loss caused by bumping.²⁵⁴ Additionally, the reservation holders have assumed the risk of being bumped.

²⁵³ See *Mortimer v. Delta Airlines, Inc.*, 302 F. Supp. 276 (N.D. Ill. 1969).

²⁵⁴ *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

An assumption that most consumers would choose conditional fares instead of the first class or coach fares would pose no problem, since the ultimate number of reservations to accept would depend on the booking curve. If the booking curve is accurate, then only that number of reservations would be accepted. If all reservations accepted were conditional reservations, those passengers would be obligated to accept that flight or a refund of the ticket price, since they have not yet been bumped. It would, therefore, be extremely difficult for consumers to take advantage of the proposed solution and unprofitable for carriers to abuse the system, since deliberate overselling of conditional fares would require giving free flights. Presumably, deliberate overbooking of first class and coach reservations would amount to a fraudulent misrepresentation. Therefore, there is no incentive for the carrier to abuse the proposal.

The proposal differs from Eastern's "Leisure Class" in that:

- 1) The Leisure Class Concept is only being used by Eastern and is not widely publicized nor uniformly applied, while the proposal would be widely publicized and uniformly applied.
- 2) Eastern uses the Leisure Class in addition to overbooking. Overbooking, while offering the conditional fare, defeats the purpose of having the Leisure Class and precludes its maximum efficiency, since the overbooked passengers are boarded prior to the conditional passengers. On the other hand, the proposal would disallow overbooking and substitute the new conditional class in its place. As reservations turned over, the conditional reservation holders would be guaranteed confirmed reservations as openings occurred. If ten reservation holders cancelled prior to departure, the first ten conditional reservation holders would automatically step into confirmed reservations.

CONCLUSION

Overbooking has plagued the airline industry and the consumer since 1947. The Supreme Court has indicated that maintaining the status quo may no longer be possible.²⁵⁵ Any other proposal that does not seek to solve or circumvent the dilemma will prob-

²⁵⁵ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

ably not be successful.²⁵⁶ The proposed solution incorporates the desired aspects of the prior plans, without their liabilities, and should be desirable both to the consumer and the carrier.²⁵⁷

It appears safe to assume that most consumers would prefer the proposal over the current system, since the consumer would be aware of his chances of boarding. He would know his chances of boarding at the time he made the reservation as opposed to the current system which abruptly bumps the reservation holder at the time of departure. It is argued that a business man would not choose a conditional reservation since he needs a guaranteed reservation. No such guarantee exists under the current system, and the reservation holder is under a false impression when he assumes his seat is guaranteed merely because he made the reservation or confirmed the reservation. Under the proposal, he could obtain a guaranteed reservation simply by booking early before the plane reached its capacity. If he booked late, he would be notified of his chances of securing a seat. The consumer could then plan his schedule accordingly. Most consumers would obviously prefer the chance to arrange their schedule to cope with the possible delay to being bumped unexpectedly and having their plans jeopardized. It is time to seal Pandora's Box, and the proposed solution is submitted as a viable alternative to nail the lid shut.

²⁵⁶ CAB EDR-296, *supra* note 1.

²⁵⁷ The proposed plan should be enforceable and appease rather than anger consumers. See CAB ERPI, *supra* note 2, for a discussion of prior plans' faults.